



REPUBLIC OF KENYA



**Okungu & 2 others v Omollo (Civil Appeal E091 of 2022)
[2023] KEHC 1857 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1857 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E091 OF 2022
TA ODERA, J
MARCH 15, 2023**

BETWEEN

JOHN CHRISPINE OKUNGU 1ST APPELLANT

JOSEPH ADERA MUKESA MITO 2ND APPELLANT

DOMNIC ONYANGO POLO 3RD APPELLANT

AND

CHARLES OTIENO OMOLLO RESPONDENT

*(Being an Appeal from the Judgment/Decree of the Honourable P.
Areri (PM) delivered on 23/06/2022 in Migori CMCC No.210 of 2019)*

RULING

1. The appellants jointly filed notice of motion dated 23.8.2021 seeking;
 - a) That this Honourable court be pleased to order Stay of execution of the judgment/decree in Migori CMCC No. 210 of 2019 delivered on 26.6.2022 pending hearing and determination of this application and appeal.
 - b) That this Honourable court be pleased to order Stay of execution of the judgment/decree in Migori CMCC No. 210 of 2019 delivered on 26.6.2022 pending hearing and full determination of appeal.
 - c) Upon grant of prayer 3 above this Honourable court be pleased to order the applicant to provide sufficient security in the form of suitable bank Guarantee from a reputable financial institution to secure the judgment herein of Ksh.350,000/=
 - d) Costs be in the cause.



2. The application is based on the annexed affidavit of Joseph Adera Mikesa Mito and the grounds that;
 - a. Judgment was entered in favour of the respondent against the applicant at Kshs.350,000/= costs and interests .
 - b. The appellants were aggrieved by the said judgment on liability and quantum
 - c. Appellants filed the appeal herein which has high chances of success.
 - d. There is no stay of execution and the decree is for a substantial sum which if paid to respondent and the appeal is successful the appellants will not be able to recover the same from respondent and thus the appeal will be rendered nugatory.
 - e. The applicants will suffer substantial loss and damage if the orders sought are not granted.
 - f. The application has been filed timeously.
 - g. The respondent will not be prejudiced in any way if the orders sought are granted.
 - h. It is in the interest of justice that the execution of the judgment and decree herein be stayed pending hearing and determination of the appeal.
 - i. The respondent is a person of straw and will not be able to refund the decretal sum if they are allowed to execute and the appeal thereafter succeeds
 - j. The applications are ready and willing to furnish such reasonable security as this honourable court may deem fit and in particular a bank guarantee for the whole decretal sum.
3. Joseph Adera Mukesa Mito the 2nd appellant who is also the insured filed supporting affidavit in which he deponed to the facts as per the grounds (Supra) and annexed s copy of the memorandum of appeal -"JAMM1"and that the Insurer M/s Directline Assurance company is willing to provide a Bank guarantee as security for the entire decretal sum as per copy of the Bank guarantee. He deponed that the appeal will be rendered nugatory unless the orders sought are granted and that the respondent is a man of straw who will not be able to refund the decretal sum incase he is paid and the appeal succeeds.
4. On 12.10.22 the court directed that the application be canvassed by way of written submissions and both parties complied with the directions.

Respondents reply

5. Respondent filed replying affidavit dated in response to the application herein and said that the memorandum of appeal is aimed at denying him the fruits of the judgment, that he is advised by his advocates on record that the appeal has no basis as the decree has not been extracted and so there is no possibility of execution also that the appeal should not operate as stay. Also that the applicants will not suffer substantial loss as the Insurer is a corporation and the suit vehicle was insured against the injuries sustained. Further that he will suffer irreparable loss as he spent a lot of money on prosecuting this suit. He denied that he is a man of straw saying he is a business man and hence able to refund the decretal sum if need be. He termed the application as misconceived, bad in law and an abuse of the process of the court and sought for its dismissal with costs.
6. Also that he is informed by his counsel on record that the applicants are liable to pay the decretal sum and suggested that pending hearing and determination of the appeal and in the event that the court orders that stay he ½ decretal sum be released to him and the other half be deposited in an interest earning account in the joint names of the advocates for both parties herein.



Applicants Submissions

7. The applicant submitted that they have filed HCCA no. E091 of 2022 Migori and that the orders of stay of execution pending appeal. They cited order 42 rule 4 and 6 of the *Civil procedure Rules* in support of their application and submitted that rule 6 (2) lays down the conditions for grant of stay of execution and the case of *Halai & another v Thornton & Turpin [1963] Ltd* [1990] eKLR cited in the case of *Elena Doudoladova Korir v Kenyatta University* [2014] eKLR where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that:-

“The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

On substantial loss

8. It was submitted that the appeal is meritorious, arguable and has high chances of success and that they will suffer substantial loss if they release the money to respondent as he has not shown that he will be able to refund the same if the appeal succeeds as they have not demonstrated that they have resources and they relied on HCCA No. 40 of 2014 *Kenya orient Ltd vs Paul Mathenge Gichuki and another* (2014)eKLR where it was held that the burden of proving respondent can refund the decretal sum shifts to him.
9. On whether the application has been filed without unreasonable delay, it was submitted that it was filed immediately after judgment was delivered.
10. On whether the applicants are willing to furnish court with security as to be ordered by the court, it was submitted that the applicants are ready to furnish the court with a bank guarantee as shown in annexure ‘JAMM2’, it was submitted that opening a joint interest earning account would be time consuming.
11. On whether the appeal had high chances of success, it was submitted that the appeal is likely to succeed as evidenced by the grounds on the face of the memorandum of appeal and that unless stay is granted the appeal will be rendered nugatory and applicants will suffer irreparable loss and damage.
12. It was also submitted that the court should balance the rights of the decree holder and appellant.

Respondent’s submissions

13. Respondent submitted that no evidence has been adduced to show that appellant will suffer substantial loss if stay is not granted. He relied on the case of *Michael Ntouthi v Abraham Kivondo Musau* [2021] eKLR where it was held “ 14. On the first principle, Platt, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:

“It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money”.



14. Further that the decree has not been extracted and so there is no threat to execution.
15. It was also submitted that the respondent's interests in enjoying the fruits of the judgment should come first and that he is likely to suffer irreparable harm as he incurred tremendous expenses in prosecuting the suit. He proposed that the 1/2 decretal amount be released to him while the other half be deposited in a joint interest earning account in the names of both counsel.
16. Also that the argument vagaries of life may make it impossible to refund the decretal sum does not hold water as respondent is a business man.
17. It was also submitted that order 42 Rule 6(1) of the civil procedure rules provides that an appeal shall not operate as an automatic stay of execution.
18. I have carefully considered the application, the reply and the able submissions by both counsel. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless –
 - (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
19. The orders of stay of execution are discretionary as was held in the case of xxx On substantial loss , the applicants said they will suffer substantial loss unless the stay is granted as the appeal will be rendered nugatory and that the respondent has not shown that he can refund the decretal sum of kshs 350,000/=. This is a money decree and the appellant has a right to appeal while the respondent has a right to enjoy the fruits of the judgment. It is clear that the appeal has been filed as evidenced by the memorandum of appeal and at this stage this court can only say that it is arguable. The respondent is opposed to the application saying she is entitled to enjoyment of the decretal sum and that the appeal is basically on quantum. I have seen the memorandum of appeal and I find that the same is on quantum and apportionment of liability .the respondent has told the court that he is a businessman but he has not given details of his business to enable the court make a finding of his means. If the entire amount is released to the respondent during the pendency of the appeal it may be difficult to recover the same in the circumstances. I find that the appellants shown that they will suffer substantial loss unless the application is allowed.



20. On whether the application was filed without unreasonable delay, the judgment was delivered on 26.6.2022 and the appeal was filed on 25.7.22 while the application was filed on 23.8.22. Respondent did not raise any issue with the time of filing. I find that the application was filed without undue delay. On security, the applicant told this court that they are willing to furnish the court with security in form of a bank guarantee for performance of the decree. The respondent on his part asked the court to order that applicant pay 1/2 of decretal sum to him and the other half to be deposited in a joint interest earning account in the joint names of both advocates herein. In the case of Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 others [2015] eKLR, where it was held that:

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

21. There is need for this court to strike a balance between the two rights herein to arrive at a just determination of the issue of security herein. Since the appeal is mainly on quantum, the respondent will be entitled to some money at the end of the day and it would thus be totally unfair to lock up the entire decretal amount in a bank guarantee. The appellant is opposed to depositing money in a joint account only on the ground that it will take time to open the account to ensure that the appeal is not rendered nugatory, I order that 1/2 of the decretal sum plus costs and interests is deposited in a joint interest earning account to be opened in the joint names of counsel for appellant and respondent within 30 days from the date of this ruling. The other 1/2 of the decretal sum i.e Kshs.175,000/= be released to the respondent also within the same period of time.

22. The application is thus allowed in the foregoing terms. Costs to the Respondent.

23. I order that the appellant to file and serve record of Appeal within 60 days from today. Mention on 22.5.23 before the Deputy Registrar for compliance/directions.

24. 30 days Right of Appeal.

T.A. ODERA - JUDGE

15.3.2023

DELIVERED VIA TEAMS PLATFORM IN THE PRESENCE OF;

NO APPEARANCE FOR APPELLANT

NO APPEARANCE FOR RESPONDENT,

COURT ASSISTANT; NYAOKE.

T.A ODERA - JUDGE

15.3.2023

